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IN THE

Supreme Court of the United States

DAVID MEYER, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND DESIGNATED OFFICER/BROKER OF TRIAD, INC., dba TRIAD REALTORS,

Petitioner,

v.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, A MINOR; BROOKS BAUER, INDIVIDUALLY AND ON BEHALF OF THE GENERAL PUBLIC,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE AND AARP IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The National Fair Housing Alliance ("NFHA") is a non-profit corporation that represents approximately eighty-five private, non-profit fair housing organizations throughout the country. NFHA was founded in 1988 to lead the battle against housing discrimination and ensure equal housing opportunity for all people. Through education, outreach, policy initiatives, advocacy and enforcement, NFHA promotes equal housing, lending, and insurance opportunities. Relying on the Fair Housing Act, NFHA and its members have undertaken important enforcement initiatives in cities and states across the country; those efforts have contributed significantly to the nation's efforts to eliminate discriminatory housing practices within the real estate industry.[1]

AARP is the nation's leading organization for people age 50 years and older with 35 million members nationwide. At the national and state level, AARP is actively involved in eliminating barriers to homeownership through research, advocacy, education and litigation. The Fair Housing Act has been an important tool in AARP's pursuit of this goal on behalf of its members.

Congress enacted the Fair Housing Act of 1968 ("FHA" or "Act") to deter discrimination in the real estate industry, to compensate its victims, and to encourage residential desegregation. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 211, 212 (1972). "Congress was aware that the measure would have a very broad reach, and indeed the legislation was seen as an attempt to alter the whole

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

character of the housing market." *Mayers* v. *Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring).

Yet "[h]ousing in the United States continues to be characterized by extremely high levels of racial segregation and unlawful discrimination." Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 2:1 (2001).[2] A 1991 study concluded that "black and Hispanic homeseekers experience discrimination roughly half of the times that they visit a rental or sales agent to inquire about advertised housing opportunities." M. Turner, *Discrimination in Urban Housing Markets: Lessons from Fair Housing Audits* 3 Housing Policy Debate 185, 188 (1991):

> There can be no doubt that the stubborn persistence of segregation is partly the result of discriminatory housing market practices – practices that create barriers to minority housing search and location choice, that discourage minority homeseekers from obtaining housing in predominantly white neighborhoods, and that prevent some white homeseekers from considering housing opportunities in racially mixed or minority neighborhoods. [*Id.*]

See also Schwemm, *supra* § 2:4 (citing studies).

Amici are committed to the vigorous enforcement of the FHA in order to fulfill the promise and achieve the purposes of the Act. As set forth *infra*, a critical component of effective FHA enforcement is the imposition of vicarious liability on persons, such as property owners and licensed real estate brokers, who control or effectively control actors engaging in discriminatory housing practices and who are in a position to prevent discrimination. *Amici* therefore file this brief in support of respondents, urging affirmance.

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[2] Professor Schwemm is one of the counsel to respondents in this Court.

SUMMARY OF ARGUMENT

As petitioner acknowledges, under the Fair Housing Act ("FHA"), a *corporate* property owner or brokerage is vicariously liable for the discriminatory acts of corporate agents. Although there is nothing in the language, history, or purposes of the FHA or in the law of agency to support his proposed distinction, Meyer nonetheless takes the position that *individual* property owners and real estate brokers are never vicariously liable for the acts of their agents. The questions for this Court, accordingly, are the appropriate test and scope of vicarious liability for individuals under the FHA and whether such liability extends to Meyer.

In this brief, *amici* show that the FHA, like all other federal civil rights statutes, imposes vicarious liability upon entities and individuals. The common law of agency, informed by the FHA's purposes, determines the scope of vicarious liability under the Act. Meyer, the designated broker, president, and sole shareholder of the small, closely-held brokerage of Triad, Inc., had a legal obligation to supervise and control the actions of Triad's real estate salespersons, including Grove Crank, the real estate salesperson who discriminated against the Holley family. Under the law of agency, Meyer is Crank's principal and is vicariously liable for Crank's discrimination in this case.

The language, history, and purposes of the Act harmoniously point to vicarious liability under the Act. As a general matter, "[t]he language of the Act is broad and inclusive," see *Trafficante*, 409 U.S. at 209. That general truth has full application to the specific legal question here. The Act does not specify or limit potential defendants; instead it defines unlawful conduct and imposes liability, without limitation, on "*any person*" who engages in such conduct. 42 U.S.C. § 3602 (emphasis supplied). "Person" is defined to include corporations and other artificial be[illegible]s demonstrating

that Congress contemplated imposition of vicarious liability for discriminatory housing practices.

The pertinent legislative history likewise reflects Congress' intention not to limit categories of potential defendants under the Act. An earlier version of the Act, which listed numerous categories of defendants, was abandoned in favor of the unrestricted language ultimately enacted. See *infra* at 12-14.

The generous statutory language is the result of the breadth and importance of Congress' purposes and the factual context of the discrimination addressed by the Act. The FHA begins by declaring that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. In pursuit of this policy, Congress sought to deter discriminatory housing practices, to compensate victims of discrimination, and to support desegregation.

Put bluntly, these ends cannot be achieved unless liability is imposed on those who control or have a right to control those who discriminate in the housing industry. The housing market consists of millions of transactions, largely involving individuals and small businesses. In addition, "[r]enting or buying a home is a complex process, consisting of many different stages at which discrimination may occur," Turner, *supra* at 189. As a result, the housing market provides numerous opportunities for discrimination by a multiplicity of different types of actors, including those individuals who control or have the ability to control small real estate brokerages. The imposition of vicarious liability on persons who control or who are in a position to control the actions of those who engage in discriminatory housing practices is necessary to fulfill Congress' ambitious purposes and goals.

Acknowledging Congress' intent comprehensively to address a deep-seated, persistent social problem, this Court has stated that the Act should be given a "'generous construction.'" *City of Edmonds* v. *Oxford House, Inc.*, 514

U.S. 725, 731 (1995) (quoting *Trafficante*, 409 U.S. at 212). In determining the scope of vicarious liability under the FHA, the lower courts have obeyed this instruction: Every federal court to consider the question has applied the common law of agency, informed by the purposes of the Act, and determined that it is appropriate broadly to impose respondeat superior liability for discriminatory housing practices under the Act. Respondeat superior liability, by its nature, imposes upon principals, such as property owners and real estate brokers, a non-delegable duty to ensure that their agents do not engage in discriminatory housing practices while acting within the scope of their agency. See cases *infra* at 19-20, 25-26.

Moreover, although Congress did not precisely delineate the boundaries of vicarious liability under the FHA, it delegated authority to the Secretary of the Department of Housing and Urban Development ("HUD") to administer and implement the Act. See 42 U.S.C. § 3614. The Secretary enacted regulations defining persons against whom administrative complaints may be filed, a group that is coextensive with the group against whom civil complaints may be filed. See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 104, 108 (1979). HUD's regulations expressly adopt the well-settled principles of respondeat superior liability described above, principles that were embodied in FHA case law at the time the regulation was promulgated. See 53 Fed. Reg. 24,185 (June 27, 1988) (citing numerous cases); see also 24 C.F.R. §103.202(b) (2000) (plain language regulation that does not alter the meaning of its predecessor). HUD's regulation falls comfortably within the scope of its authority to administer and interpret the FHA and is entitled to deference. See *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

The legal framework for analysis of vicarious liability under the FHA mirrors the legal framework for numerous federal statutes. The same framework is applied in actions against private parties under Title VII, the ADEA, the ADA,

section 1981, section 1982, and the Sherman Act. See *infra* at 19-20. Consistent with its interpretation of these statutes, this Court should hold that under the FHA, a principal is liable for the discriminatory housing practices of an agent acting within the scope of his or her agency.

The parties agree that Triad, Inc., a real estate brokerage, is vicariously liable for the discriminatory acts of Grove Crank, th real estate salesperson who discriminated against the Holley family. That leaves for decision only the question whether under agency principles, Meyer is also liable. Plainly, he is. Meyer was the sole licensed broker of Triad, and any real estate salesperson at Triad worked under Meyer's license and his supervision and control. Meyer was a licensed professional who was subject to regulatory sanction for, *inter alia*, failure adequately to supervise Crank. Cal. Bus. & Prof. Code §§ 10159.2, 10175-10185. As president, sole owner, and supervising corporate broker of a small, closely-held brokerage such as Triad (an entity typical of those involved in millions of real estate transactions annually), Meyer had a legal duty to supervise Crank, was in a position to control Crank, and was also the sole beneficiary of acts within the scope of Crank's agency. Holding Meyer responsible for the discrimination of those operating under his license and supervision is not only consistent with the unrestricted statutory language and HUD's interpretation of that language, but also is critical to the achievement of Congress' purposes in enacting the FHA.

This does not entail an abrogation of general principles of corporate law. Nor does holding Meyer liable mean that corporate officers and shareholders generally will be deemed vicariously liable for the discriminatory acts of corporate agents committed within the scope of their agency. Meyer's liability flows from his ability and obligation as licensed broker, president, and owner to control the conduct of Triad's real estate salespersons. Many corporate officers and shareholders have no such unique relationship with individual

corporate agents. In the corporate setting, moreover, control and benefit are often substantially diluted; many corporate officers and shareholders will have neither sufficient control nor reap sufficient benefit to justify imposition of liability under agency principles.

In addition, Meyer acknowledges that he would be liable for his own misdeeds. Under the FHA, such misdeeds include the negligent supervision of salespersons that Meyer's professional license legally obligated him to supervise and control. Finally, Meyer could be held liable under a veil-piercing analysis, an issue the lower courts did not reach.

For all these reasons, Meyer may be held liable for the FHA violation that occurred in this case.

ARGUMENT

The Fair Housing Act was enacted "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. It prohibits specified types of discrimination in any aspect of a transaction relating to the sale, rental or financing of dwellings. See 42 U.S.C. §§ 3604, 3605, 3606, and 3617.

The FHA establishes three mechanisms by which such discriminatory housing practices can be addressed and remedied: (i) an administrative complaint filed with the Secretary of HUD, 42 U.S.C. § 3610; (ii) a private civil action filed in federal district court, *id.* § 3613; and (iii) an action by the Attorney General of the United States filed in federal district court, *id.* § 3614. "Complaints by private persons are the primary method of obtaining compliance with the Act." *Trafficante*, 409 U.S. at 209.

This case involves a private civil action, alleging intentional discrimination in housing practices because of race or color. The parties agree that a defendant is not vicariously liable under the FHA simply because he or she is

a corporate officer or shareholder. This status, however, does not shield from vicarious liability a defendant who is in fact the principal of a corporate agent who discriminates. *Amici* show that the FHA imposes vicarious liability pursuant to the federal common law of agency, informed by the purposes of the Act, and that Meyer is vicariously liable for Crank's discrimination here.

1. *The Statutory Language.* The text of the statute is "[t]he starting point in every case involving construction of a statute." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). The FHA does not limit in any way the class of persons or entities that may be held liable for discriminatory housing practices. The operative sections of the Act defining prohibited conduct state that "[i]t shall be unlawful to [engage in certain conduct]." See §§ 3604, 3606, 3617. In section 3606, the operative language further specifies that "[i]t shall be unlawful for *any* person or other entity whose business includes engaging in real estate-related transactions to discriminate. . . ." (Emphasis supplied.) This language contains no hint of limitation on the class of potential defendants. "The word 'any' excludes selection or distinction. It declares [the category] without limitation." *Citizens' Bank* v. *Parker*, 192 U.S. 73, 81 (1904). See also *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993).

Moreover, the FHA broadly defines "person" to "include[] one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, receivers, and fiduciaries." See § 3602. Because corporations and other artificial entities can be held liable *only* through the acts of others, *i.e.*, only under a theory of respondeat superior liability, Congress' definition of "person" to include "corporations" and other artificial entities necessarily entails congressional approval for respondeat

superior liability and related agency theories under the FHA. Cf. *United States* v. *A&P Trucking Co.*, 358 U.S. 121, 126-27 (1958) (holding that Congress' decision to define a "person" potentially liable under the Motor Carrier Act to include "copartnerships" showed that the partnership could be liable under respondeat superior "quite apart from the participation and knowledge of the partners as individuals").

The inclusive statutory text also makes clear that the Act was not drafted to respond to discrimination by specified categories of defendants. Instead, the "unmistakable focus" of the statutory language is the protection of "the benefited class." *Cannon* v. *University of Chi.*, 441 U.S. 677, 691 (1979). Because the text does not limit the class of potential violators and is instead directed toward the rights of a protected class, it is most naturally read as extending liability to any person or other entity with effective control over the housing transaction at issue.

On a more general level, this Court has previously recognized that "the language of the Act is broad and inclusive," *Trafficante*, 409 U.S. at 209, and has several times stated that the Act should be given a "'generous construction.'" *City of Edmonds*, 514 U.S. at 731 (quoting *Trafficante*, 409 U.S. at 212). Indeed, in *City of Edmonds*, this Court narrowly construed an exception to the FHA's coverage based on the general rule that the Act should be generously construed to serve its purpose of preventing and remedying discriminatory housing practices. The Court stated that "we regard this case as an instance in which an exception to 'a general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy].'" *Id.* at 731-32 (quoting *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989)). *A fortiori*, the Court should not engraft limitations on the class of defendants liable for discriminatory housing practices where the FHA contains no such limitations. Instead, the Court should give the Act a generous construction to provide for liability where doing so

would "preserve the primary operation of the [Act's] policy." *Id.* Specifically, the Court should hold that any person or entity with effective control over a housing-industry transaction bears responsibility for commission of a discriminatory housing practice during that transaction.

The imposition of liability on those with effective control over housing-industry transactions is also necessary to achieve the purposes of the FHA. Congress intended to achieve fair housing "throughout the United States," by deterring discrimination, compensating its victims, and supporting desegregation. 42 U.S.C. § 3601. Discrimination is, however, extremely difficult to combat in the housing industry for several reasons. First, individual buyers and renters are not regular participants in the market. They enter the market for a single transaction and are ill-positioned to detect or challenge single acts of discrimination (*i.e.*, steering to a neighborhood largely composed of members of the buyer or renter's racial group). See Robert G. Schwemm, *The Private Enforcement of the Federal Housing Act*, 6 Yale L. & Pol'y Rev. 375, 379-81 (1988).

Second, and critically here, the housing industry consists of millions of transactions among individuals and small and large businesses. "Renting or buying a home is a complex process, consisting of many different stages at which discrimination may occur."[3] Turner, *supra* at 189.[4]

[3] As Turner explains:

> Discrimination can occur if the housing opportunity is advertised or marketed in such a way that qualified minority homeseekers do not learn about it, if agents refuse to do business with minority customers or treat them unfavorably in their initial encounter, if agents fail to follow up business with minority customers, if the final terms of sale or lease for minority customers are unfavorable, or . . . if minority customers are unable to obtain mortgage financing or homeowners' insurance. [Turner, *supra* at 189.]

[4] This practical reality is also reflected in the many different roles played by defendants in FHA cases. *See, e.g.*, *Alexander* v. *Riga*, 208 F.3d 419 (3d Cir. 2000) (joint owner who did not participate in co-owner's discrimination), *cert. denied*, 531 U.S. 1069 (2001); *Jankowski* v. *HUD*, 91 F.3d 891 (7th Cir. 1996) (building manager, corporation that owned the building, and managing partner and investor in the building); *City of Chi.* v. *Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992) (sole shareholder, chief executive officer, corporation and sales agents); *Green* v. *Century 21*, 740 F.2d 460 (6th Cir. 1984) (real estate agents and real estate agency); *Davis* v. *Mansards*, 597 F. Supp. 334 (N.D. Ind. 1984) (rental agents, rental manager, and management company); *Steward* v. *Furton*, 774 F.2d 706 (6th Cir. 1985) (owner and manager of trailer park, lessee of trailer pad); *Marya* v. *Slakey*, 190 F. Supp. 2d 95 (D. Mass. 2001) (landlord and tenant); *Woods* v. *Foster*, 884 F. Supp. 1169 (N.D. Ill. 1995) (non-profit organization); *Williamson* v. *Hampton Mgmt. Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972) (desk clerk of management company); *Schroder* v. *DeBartolo*, 879 F. Supp. 173 (D.P.R. 1995) (condominium's board of directors); *Fenwick-Schafer* v. *Sterling Homes Corp.*, 774 F. Supp. 361 (D. Md. 1991) (real estate developers); *Ragin* v. *Steiner, Clatman & Assocs.*, 714 F. Supp. 709 (S.D.N.Y. 1989) (advertising agency); *Seaphus* v. *Lilly*, 691 F. Supp. 127 (N.D. Ill. 1988) (neighbor).

Discrimination in housing is most frequently caused not by a single act of discrimination having widespread impact, but by the discrete acts of individual property owners and real estate brokers and agents. Indeed, a significant number of real estate transactions involve small brokerages, such as Triad, Inc.; the routine business of the housing industry is carried out by the myriad decisions of agents working for small brokerages. It is not possible to deter and compensate for discrimination unless persons with effective control over these agents are liable for the agents' discriminatory acts.

The generous language of the FHA focuses on benefiting a protected class, imposes no limitation on the class of potential defendants, and makes clear that some vicarious liability is contemplated. In light of the nature of the housing industry, the imposition of vicarious liability is necessary to achieve Congress' important purposes in enacting the FHA. "[M]eaning [is] imparted to [the words of the statute] by the mischief to be remedied." *Duparquet, Huot & Moneuse* v.

Evans, 297 U.S. 216, 221 (1936). The statutory text thus strongly supports broad vicarious liability for those persons who control or have a right to control housing-industry actors who discriminate.

2. *The Legislative History.* The legislative history fully supports this reading of the text. The FHA was the culmination of a process that began with a proposal by President Johnson in 1966. Its substantive provisions changed very little from those set forth in that proposal, but some evolution in the language occurred that is relevant here.

As enacted, the FHA's substantive provisions state simply that "[i]t shall be unlawful" to engage in specified discriminatory practices or that it shall be unlawful for "any person or entity whose business includes engaging in real estate-related transactions" to discriminate. See *supra* at 8. President Johnson's initial proposal, however, had listed the defendants to whom the central prohibition would apply:

> It shall be unlawful for the owner, lessee, sublessee, assignee, or manager of, or other person having the authority to sell, rent, lease, or manage, a dwelling or for any person who is a real estate broker or salesman, or employee or agent of a real estate broker or salesman [to engage in discriminatory housing practices]. [112 Cong. Rec. 18,117 (1966).]

A memorandum provided to the House of Representatives stated that the list was intended to be "all inclusive." *Id.*

In response, the House Judiciary Committee altered the President's proposal. It limited those liable under the FHA to "real estate professionals and other persons in the business of building, developing, buying, selling, renting, or leasing housing, thereby excluding homeowners and other non-professionals from coverage." Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(C): A New Look At The Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 201-02 (2001).[5]

In 1967, however, Senator Mondale proposed S. 1358, which abandoned any attempt to identify potential defendants in FHA actions and employed the "[i]t shall be unlawful . . ." formulation. During roughly the same time, the House of Representatives was considering H.R. 2516, a civil rights bill without any fair housing title. The Senate bill was strongly opposed by the National Association of Real Estate Boards (predecessor of the National Association of Realtors) and numerous state realtor organizations, including California. See, *e.g.*, *Fair Housing Act of 1967: Hearings on S.1358, S. 2114, and S.2280 Relating to Civil Rights and Housing before the Subcomm. On Housing and Urban Affairs of the Sen. Comm. On Banking and Currency*, 90th Cong. 437-57 (1967); *The Civil Rights Act of 1967: Hearings on S.1026, S.1318, S.1359, S.1362, S.1462, H.R. 2516 and H.R. 10805 before the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary*, 90th Cong. 491-97 (1967); *The Civil Rights Act of 1967: Hearings on S.3296, Amendment 561 to S.3296, S.1497, S.1654, S.2864, S.2923, and S.3170*, 89th Cong. 418-39, 439-52, 489-92, 524-37, 864-67, 877-83, 883-89, 918-928, 1058-62, 1062-74, 1082-1089, 1653-64 (1966). Witnesses in the hearings testified that realtors were a substantial source of discriminatory housing practices and their product (segregation). See, *e.g.*, *Hearings on S.1026, etc.*, *supra*, 90th Cong. at 206, 360; *id.* at 406-07 (a realtor sympathetic to the bill identified as the principal external

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[5] Specifically, this version of House Bill 14765, passed by the House on August 9, 1966, provided that "It shall be unlawful for any person who is a real estate broker, agent, or salesman, or employee or agent of any real estate broker, agent, or salesman, or any other person in the business of building, developing, selling, renting, or leasing dwellings, or any employee or agent of any such person" to engage in discriminatory housing practices." 112 Cong. Rec. 18,112 (1966).

reason for the perpetuation of residential segregation "[t]he policies and practices of those engaged in real estate").[6]

Nonetheless, when H.R. 2516 was passed by the House, and sent to the Senate for consideration in January 1968, Senators Mondale and Brooke sponsored S.1358 as an amendment to the House bill. Jean E. Dubofsky, *Fair Housing: A Legislative History And A Perspective*, 8 Washburn L.J. 149, 151-52 (1969) (citing 114 Cong. Rec. S980-83 (daily ed. Feb. 6, 1968)). The bill met with opposition, but Senator Dirksen and others worked out a compromise in the form of a substitute amendment to H.R. 2516. *Id.* at 154, 156-57. Like S.1358, that amendment employed the "[i]t shall be unlawful . . ." formulation. That compromise, however, might not have been enacted, but for two events that followed.

First, on March 1, 1968, the Kerner Commission released its report on the civil disorders that had wracked America, with its blunt admonition that "America is dividing into two societies, black and white, separate and unequal," and its recommendation that the federal government enact a comprehensive, enforceable open housing law covering the sale and rental of all property. Dubofsky, *supra* at 158 (quoting *The National Advisory Commission on Civil Disorders Report* (1968)). Second, on April 4, 1968, Martin Luther King was assassinated. On April 10, "with National Guard troops called up to meet riot conditions in Washington, still in the basement of the Capitol, the House debated fair housing." *Id.* at 160. The bill passed, and was signed by President Johnson on April 11, 1968.

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[6] Until at least 1950, the NAR's Code of Ethics provided that realtors "should never be instrumental in introducing into a neighborhood . . . members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in the neighborhood." Rose Helper, *Racial Policies and Practices of Real Estate Brokers* 224 (Press 1969).

The "[i]t shall be unlawful . . ." formulation became law without any limitation on the class of potential defendants. In light of this history, including the record of opposition and discrimination by the real estate industry, the fulfillment of Congress' purpose requires a generous construction of the class of persons liable for unlawful housing practices, including those real estate professionals with effective control over housing transactions where discrimination occurs.

3. *HUD's Expert Interpretation of the Statute It Administers.* Congress has delegated authority to implement and administer the FHA to HUD. See 42 U.S.C. § 3608 ("[t]he authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development"). HUD's regulations authorize the filing of administrative complaints against all persons with effective control over persons who engage in discriminatory housing practices within the scope of their agency. In addition, decisions of the Secretary and Administrative Law Judges adjudicating complaints filed under the HUD regulations have consistently interpreted the FHA to make such persons liable. This HUD interpretation is entitled to deference under *Chevron*, 467 U.S. at 843-45. See *Trafficante*, 409 U.S. at 210 (HUD's "consistent administrative construction of the Act" is "entitled to great weight"); *Gladstone, Realtors*, 441 U.S. at 107 (HUD's "interpretation of the [FHA] ordinarily commands considerable deference").

HUD's statutory interpretation occurs in the context of the administrative complaint process, but that interpretation has full application to private civil actions under the FHA. The administrative complaint process and the private civil action under the FHA are "alternative" or "parallel" remedies for discriminatory housing practices and have the same scope. See *Gladstone, Realtors*, 441 U.S. at 107-08 (holding that nothing in the statutory text, legislative history, or administrative interpretation of the FHA suggested a different scope for the private civil action and the administrative

enforcement action). Cf. also *NCAA* v. *Smith*, 525 U.S. 459, 467 n.5 (1999) (rejecting the argument that the scope of the private right of action to enforce Title IX of the Education Amendment of 1972 differs from the scope of the government's enforcement authority).

In 1984, pursuant to the statutory delegation of rulemaking authority, the Secretary of HUD issued proposed regulations governing the administrative complaint process under the FHA, including a regulation setting forth the "persons against whom a complaint may be filed." 49 Fed. Reg. 40,528, 40,533 (Oct. 16, 1984). In explaining his proposed rule, the Secretary stated that a complaint may be filed against any person engaged in, or about to engage in, discriminatory housing practices *and* further that "any person who directs or controls or who has the authority to direct or control the conduct of a person is responsible for the discriminatory housing practices by such other person." *Id.* He explained that this provision was "based on judicial precedents that persons involved in the sale, rental or financing of dwellings have a nondelegable duty to assure that all conduct relating to any aspect of the sale, rental or financing of dwellings complies with the Fair Housing Act and that a person who supervises, directs or employs other persons can be legally responsible for actions of such other persons which violate the Fair Housing Act." *Id.* (citing numerous cases).

On June 27, 1988, the Secretary issued his Final Rule determining "persons against whom complaints may be filed." 53 Fed. Reg. 24,184-85. He noted that the National Association of Realtors objected to the regulation on the ground that it imposed absolute liability on a principal. The Secretary denied any such intent, explaining that:

> the intent, in proposing paragraph (b), was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent. . . . . HUD has revised the language of paragraph (b) of §§ 105.13 to provide that a complaint

> may be filed against a directing or controlling person with respect to the discriminatory acts of another *only if the other person was acting within the scope of his or her authority as employee or agent of the directing or controlling person.*" [*Id.* (emphasis supplied).][7]

In 1999, the Secretary promulgated an interim rule revising these regulations to use "plain language" and make the regulations more understandable. The Secretary specifically stated that the "rule does not change the substance of the existing fair housing complaint processing regulations." 64 Fed. Reg. 18,538-39 (Apr. 14, 1999). And, indeed, while the revised § 103.20 no longer appears to describe the persons against whom complaints may be filed, § 103.202 of the final plain language regulation indicates that HUD will serve notice on "any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint." See 24 C.F.R. § 103.202(b) (2000).

Finally, even if the plain language regulation were deemed a departure from the prior regulation (which it is not), that change would be irrelevant here. The prior regulation was in effect at the time of the incident in question, and changes to the regulation may not be retroactively applied. See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988) (holding that statutory grants of rulemaking authority do not encompass retroactive rulemaking authority unless that power is conveyed by express terms). Thus, HUD's prior regulation,

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[7] *See* 24 C.F.R. § 105.13 (1988). On January 23, 1989, the Secretary issued a Final Rule implementing the amendments to the FHA in the Fair Housing Amendments Act of 1988, but made no changes in the rules governing the types of persons against whom fair housing complaints could be filed. 54 Fed. Reg. 3232, 3260. The Secretary rejected the comments seeking changes in the rule as promulgated and adopted in 1988, saying that the comments "have presented no argument that convinces the Department that its current analysis of the case law on this point is incorrect." *Id.*

interpreting the scope of the FHA, is entitled to *Chevron* deference in this case.

The expert agency that administers the FHA has interpreted it to impose vicarious liability based upon common law principles of agency, and that interpretation is entitled to deference from the courts.

4. *Delineating the Precise Scope of Vicarious Liability Under the FHA.* (a) Petitioner agrees that, under the FHA, *corporate* property owners and brokerages are vicariously liable for the discriminatory acts of corporate agents, but argues that *individuals* are not. Thus, the issues before this Court are the appropriate test and scope for vicarious liability for individuals under the FHA and whether Meyer is liable.

Respondeat superior liability is simply one of several types of vicarious liability (*e.g.*, conspiracy liability, aiding and abetting liability, strict liability). Under the FHA, respondeat superior liability exists whenever a principal would be liable for the conduct of an agent under traditional principles of agency law, as informed by the purposes of the FHA. Cf. *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999) (analogous holding in Title VII context).

Respondeat superior liability is deeply rooted in western law and jurisprudence. Although its origins are uncertain, "[m]ost of the English cases that provided the genesis of the modern respondeat superior doctrine were decided in the late 1600s and early 1700s." R. Prentice, *Conceiving The Inconceivable and Implementing the Preposterous: The Premature Demise of Respondeat Superior Liability Under Section 10(b)*, 58 Ohio St. L.J. 1325, 1367 (1997) (citing decisions and scholarly authority). See also 1 William Blackstone, *Commentaries on the Law of England* 429-30, 432 (1765) ("the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the

blame on his agent. The reason of this is uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself").

Every court to consider the question has held that liability for discriminatory housing practices under the FHA is not limited to the individuals or entities directly involved in the transaction at issue – *i.e.*, that liability may be vicariously imposed upon individuals and corporate entities. See, *e.g.*, *Cabrera* v. *Jakabovitz*, 24 F.3d 372 (2d Cir. 1994); *Matchmaker Real Estates Sales Ctr.*, 982 F.2d 1086; *Walker* v. *Crigler*, 976 F.2d 900 (4th Cir. 1992); *Northside Realty Assocs., Inc.* v. *United States*, 605 F.2d 1348 (5th Cir. 1979); *Marr* v. *Rife*, 503 F.2d 735 (6th Cir. 1974). Specifically, the courts have applied respondeat superior liability, authorizing "the imposition of liability upon a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant." *General Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 392 (1982) (citing *Restatement (Second) of Agency* §§ 215-216, 219 (1958); W. Prosser, *Handbook of the Law of Torts* §§ 69-70 (4th ed. 1971)). Agency is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* at 392 (quoting *Restatement* § 1). Respondeat superior liability, accordingly, makes the principal liable for the wrongful acts of the agent committed within the scope of his or her agency.

There is nothing remarkable about the imposition of respondeat superior liability in a private civil action enforcing federal rights and obligations against private actors and entities. That is the rule under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which forbids employers to discriminate against employees because of race, color, religion, sex or national origin. See *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 760 (1998). See also *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 802 (1998) ("it makes sense to

hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority"). Employers are liable for the discriminatory conduct of their agents pursuant to a federal common law of agency, as set forth in the Restatement (Second) of Contracts and as modified to accord with Congress' purpose and goals in enacting Title VII. Applying this framework, this Court has held that employers are vicariously liable for the discriminatory acts of their agents under Title VII, even though they did not know, could not have known, and would not have approved of the discrimination at issue. See *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 70-71 (1986).

The same analytical framework is applied under the Age Discrimination in Employment Act and the Americans With Disabilities Act. See, *e.g.*, *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999); *Mason* v. *Stallings*, 82 F.3d 1007 (11th Cir. 1996); *DeVito* v. *Chicago Park Dist.*, 83 F.3d 878 (7th Cir. 1996); *Birkbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1996); *Breeding* v. *Arthur J. Gallagher & Co.*, 164 F.3d 1151 (8th Cir. 1999); *Quinones* v. *City of Evanston, Ill.*, 58 F.3d 275 (7th Cir. 1995). The doctrine of respondeat superior also applies in civil actions against private parties under § 1981, 42 U.S.C. § 1981 (prohibiting race discrimination in contracting and in legal proceedings), and § 1982, 42 U.S.C. § 1982 (prohibiting race discrimination in the sale and rental of property). See *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 392-93; *Berger* v. *Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1430 (D.C. Cir. 1988); *Cabrera*, 24 F.3d at 385-88; *Matchmaker Real Estate Sales Ctr.*, 982 F.2d at 1096. Finally, these traditional principles of agency law also govern the application of vicarious liability in federal antitrust actions. See *American Soc'y of Mech. Eng'rs* v. *Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) (applying "traditional agency law" to impose treble damages upon a principal for the acts of its agents taken with apparent authority, saying

that "[s]ince treble damages serve as a means of deterring antitrust violations and compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold [the defendant] liable for the acts of agents committed with apparent authority") (citing *Restatement* § 217C cmt. c at 474). "There is a general judicial acceptance for applying common law agency principles to federal statutes," including the FHA. B. Black, *Application of Respondeat Superior Principles to Securities Fraud Claims Under RICO*, 24 Santa Clara L. Rev. 825, 837 (1984).[8]

The imposition of respondeat superior liability under the FHA is wholly consistent with the law of agency, the jurisprudence of the FHA, and the judicial construction of other federal civil rights statutes. Nothing in any of these areas of law supports petitioner's argument that respondeat liability under the FHA should be confined to corporations.

(b) That leaves only the question whether Meyer controlled or had the right to control Crank for purposes of FHA analysis. On the facts of this case, Meyer's relationship with Triad's real estate salespersons comfortably satisfies the test for agency under the FHA.

First, Meyer's status as designated broker of Triad by itself is sufficient to establish that he is Crank's principal for FHA purposes. Under California law, a corporation cannot be licensed to do business as a real estate brokerage without designating an individual with a broker's license as its designated officer/broker. Cal. Bus. & Prof. Code §§ 10130, 10131, 10159.2, 10211. The designated broker:

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[8] *See also* A. Conrad, *Enterprise Liability and Insider Trading*, 49 Wash. & Lee L. Rev. 913, 915-17 (1992) (describing the "triumph" of respondeat superior liability in the Western world's legal systems); R. Prentice, *supra* at 1361.

> shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required. [*Id.* § 10159.2(a).]

In addition, a designated broker's license may be suspended or revoked if "as a broker licensee, [he] failed to exercise reasonable supervision over the activities of his . . . salespersons; or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required." *Id.* § 10177(h). See *Nelson* v. *Department of Real Estate*, 161 Cal. App. 3d 939 (1984) (upholding suspension of designated broker's license for failure to supervise); 10 California Code of Regulations §§ 2725, 2780 (2002).

These provisions were enacted to "prevent unlicensed persons from obtaining authorization of a licensee to use that licensee's name and then proceed[ing] to carry on business free of any licensee participation or direction." Sen. Comm. on Bus. & Professions, *Staff Analysis of AB 985* (Cal. 1979). The legislation "stipulates that the designated officer named on the corporate license application assumes responsibility for officer's, employee's and salesperson's compliance with the provisions of the Real Estate Law," and "attempts to insure licensed supervision of real estate corporation activity by holding designated officers personally responsible for that supervision." *Id.* See also *Assembly Comm. on Labor, Employment and Consumer Affairs: Statement of Chairman Lockyer on AB 985* (Cal. 1979) ("[t]he only way that the active participation of the licensed individual can be ensured is by 'piercing the corporate veil' and making the individual licensee vulnerable to action on account of corporate misdeeds, or on account of failure to fulfill corporate

responsibilities"). The "entire statutory scheme requires the broker actively to conduct his brokerage business and to supervise the activities of his salesmen. It precludes salesmen from taking charge of or conducting a business . . . which requires a broker's license." *Grand* v. *Griesinger*, 325 P.2d 475, 481 (Cal. 1958). See also *Alhino* v. *Starr*, 112 Cal. App. 3d 158, 169 (1981) (California law imposes upon a broker the same obligation of undivided service and loyalty that it imposes on a trustee, including a duty of good faith and fair disclosure).[9]

The relationship between a designated broker and a salesperson created by state law by itself gives the former sufficient control over the latter to create an agency relationship under the FHA. Indeed, the FHA itself reflects that a state's licensing and regulation of brokers is an important indication that such brokers exercise control sufficient to make them responsible for discrimination under the Act. It does so by requiring HUD to share its findings of discriminatory housing practices with state regulatory authorities so that the latter, too, can respond to conduct unlawful under the Act. See 42 U.S.C. § 3612(g)(5).

In this case, moreover, there were several other important indicia of Meyer's control of Crank. Meyer was the sole licensed real estate broker of Triad, a small brokerage employing only a handful of agents. In addition, Meyer was the president of Triad at all relevant times, and thus its chief executive officer. Finally, Meyer was the sole shareholder of Triad, which was a closely-held corporation. He was, accordingly, the lone beneficiary of any salesperson action

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[9] Other States' schemes similarly establish relationships of agency between designated brokers and real estate salespersons. *See, e.g.*, *Century 21 Action Realty II v. Smith*, 533 So.2d 626 (Ala. Civ. App. 1988); *Timmerman* v. *Smith*, 413 So. 2d 627 (La. Ct. App. 1982); *Kimball Bridge Road at Big Creek* v. *Everest Realty Corp.*, 234 S.E.2d 673 (Ga. Ct. App. 1977); *Jory* v. *Bennight*, 542 P.2d 1400 (Nev. 1975); *Circle T Corp.* v. *Deerfield*, 444 P.2d 404 (Colo. 1968).

taken within the scope of employment. At the very least, these facts in combination with Meyer's status as designated broker created a relationship of control sufficient to constitute agency under the FHA.[10]

This analysis in no way compromises or departs from general principles of corporate law. Meyer's liability flows from the nature of his relationship with Crank. Holding Meyer liable does not mean that numerous corporate officers and shareholders routinely will be deemed vicariously liable for the discriminatory acts of corporate agents committed within the scope of their agency. Meyer's status as designated corporate broker, with its concomitant professional obligations, is critical in this regard. Many corporate officers and shareholders do not have such direct relationships with individual corporate agents. In addition, as both sole shareholder and president of a small, closely-held corporation, Meyer exercised extraordinary control over the corporation's agents and exclusively benefited from their actions within the scope of that agency. In a typical corporate setting, control and benefit are both indirect and diluted for shareholders and officers. The conclusion that Meyer is Crank's principal is therefore wholly consistent with the common law of agency and does not contravene the common law of corporations.

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[10] It makes no difference that California courts have not decided whether, under current law, there is a private civil cause of action against a designated real estate broker for negligent supervision of real estate salespersons. Indeed, no California state court has ruled on the question since the 1979 amendments to California law. A federal bankruptcy court concluded that these amendments had authorized such a cause of action; that decision was ultimately reversed. *See In re Grabau*, 151 B.R. 235 (1991), *rev'd*, 151 B.R. 227 (C.D. Cal. 1993). In any event, the scope of vicarious liability under the FHA is a federal question. The issue, accordingly, is whether the relationship between a designated real estate broker and real estate salespersons under his or her supervision is an agency relationship -- *i.e.*, one involving control or the right to control within the meaning of federal law.

5. *A Principal's Duty Not To Discriminate Is Non-Delegable.* To say that a principal's duty not to discriminate under the FHA is non-delegable is simply to say that the principal will be vicariously liable for his or her agent's discrimination. As this Court stated, "[i]n a sense, to characterize a duty as non-delegable is merely to restate the duty." *General Bldg. Contractors*, 458 U.S. at 396.

Under the FHA, all persons with control or the right effectively to control actors who engage in discrimination (*i.e.*, principals) have a non-delegable duty to ensure that such persons (*i.e.*, agents) do not discriminate. This is simply a different way of saying that under the FHA, principals are vicariously liable for the discrimination of their agents. See *Walker*, 976 F.2d at 904 ("Here we adopt the general rule applied by other federal courts that the duty of a property owner not to discriminate in the leasing or sale of that property is non-delegable"); *Green*, 740 F.2d at 465 ("a principal cannot free himself of liability by delegating a duty not to discriminate to an agent"); *Marr*, 503 F.2d at 742 (holding the owner of a real estate agency liable for the discriminatory acts of the agents because he "had at least the power to control the acts of his salesman").[11]

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[11] *See also United States* v. *Youritan Constr. Co.*, 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd*, 509 F.2d 623 (9th Cir. 1975) (holding a corporation and its sole shareholder who failed to supervise his managers and failed to establish procedural standards liable for discriminatory acts performed by property managers and employees of the corporation) ("[t]he discriminatory conduct of an apartment manager or rental agent is, as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable"); *Saunders* v. *General Servs. Corp.*, 659 F. Supp. 1042, 1059 (E.D. Va. 1986) ("[u]nder the Fair Housing Act, a corporation and its officers 'are responsible for the acts of a subordinate employee . . . even though these acts were neither directed nor authorized' . . . because the statutory duty not to discriminate is non-delegable"); *United States* v. *Real Estate Dev. Corp.*, 347 F. Supp. 776 (N.D. Miss. 1972) (holding the owner of an apartment complex liable for

Amici do not contend that a principal is liable for acts of an agent that are beyond the scope of agency or that a principal is liable for the acts of those who are not its agents. Our position is that where an agency relationship exists under the FHA, the "innocent" principal is vicariously liable for an agent's discriminatory acts, whether that principal is incorporated or not.

As described above, it is entirely commonplace in the law to impose liability on an "innocent" principal for the wrongful acts of an agent subject to that principal's control – *viz.*, to make a legal duty non-delegable. For example, in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 13-15 (1991), this Court held that the imposition of liability on an insurance company for the fraud committed by one of its agents without the company's knowledge or consent does not violate the company's right to due process. In so doing, the Court explained that holding an employer liable for the intentional fraud of its employees – even where the employer is innocent – "creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" *Id.* at 14 (quoting *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112, 116 (1927)). Similarly, in *Hydrolevel*, 456 U.S. at 572, this Court explained its decision to impose vicarious liability by stating that "[o]nly [the employer] can take systematic steps to make improper conduct on the part of

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the enforcement of a discriminatory rental policy by its general and resident managers where owner had endorsed the policy); *Williamson*, 339 F. Supp. 1146 (holding a property management company vicariously liable for the discriminatory acts of a desk clerk working at an apartment building that the company managed where the desk clerk had apparent authority to negotiate with potential lessees and where the discrimination occurred in the presence of the assistant manager who had authority to approve or disapprove of the conduct). *Cf. Dillon* v. *AFBIC Dev. Corp.*, 597 F.2d 556 (5th Cir. 1979) (holding that the property owner was not liable because he had entered into a contract for sale of the lot to a builder, depriving him of the right to control the marketing activities of the builder or the real estate broker and thus eliminating any agency relationship).

all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for [the employer] to take these steps"). See also *HUD* v. *Rucker*, 122 S. Ct. 1230, 1235 (2002) (upholding the government's no-fault eviction regulation because "[s]trict liability maximizes deterrence and eases enforcement difficulties").

In sum, although courts have characterized the duty not to discriminate under the FHA as non-delegable, courts have *not* held property owners and real estate brokers liable for their agents' acts when those acts are beyond the scope of agency. Instead, this characterization is simply a different way of saying that under the FHA, as under numerous other federal statutes, a principal is vicariously liable for the acts of an agent within the scope of agency.

6. *Broad Vicarious Liability Furthers The Policies of the FHA.* A generous conception of the scope of agency, in combination with respondeat superior liability, serves the FHA's purposes. Congress intended to compensate victims of discrimination, to deter discrimination, and to advance desegregation in the private housing markets by protecting the market's ability to function unimpeded by discrimination.

First, respondeat superior liability assists victims of discrimination seeking compensation. It is extremely difficult for plaintiffs injured by the discrimination of agents or employees to prove that the principal or employer was somehow careless in hiring or in supervision. Prentice, *supra* at 1376-77. Respondeat superior liability diminishes the need for such discovery, while still requiring the plaintiff to show both that an agency relationship existed and that the agent was acting within the scope of his or her authority. Moreover, respondeat superior liability helps ensure compensation for victims of discriminatory housing practices by expanding the group of responsible defendants to include all those with effective control over the conduct at issue.

Second, respondeat superior liability deters discrimination by inducing greater diligence and care in the hiring and supervision of agents and employees. See *Monell* v. *New York City Dep't of Health & Human Servs.*, 436 U.S. 658, 693 (1978) (respondeat superior rests on "the common sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the costs of accidents"); *Hydrolevel*, 456 U.S. at 572-73 ("[I]f . . . [the defendant] is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. 'Pressure will be brought on [it] to see to it that [its] agents abide by the law. Only [defendant] can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability inevitably will be a powerful incentive for [it] to take those steps. Thus, a rule that imposes liability . . . is most faithful to the congressional intent that the private right of action deter antitrust violations").

Finally, respondeat superior liability protects free competition and choice in the housing market. See Turner, *supra* at 188 ("discrimination per se prevents minority Americans from competing freely and equally in the housing market . . . . [and] prevents minority Americans from exercising freedom of choice in housing market transactions").

7. *Piercing the Corporate Veil.* The question whether a federal court may "pierce the corporate veil" under the FHA, and thus hold corporate owners liable for the acts of a corporation is a red herring here. Veil piercing is not a separate cause of action, but a remedial device or theory of recovery that applies where an individual owner or parent corporation *is*, in some legal sense, the corporation. 1 W. Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 603 (1990). Cf. also *Mass. Laborers' Health & Welfare Fund* v. *Starrett Paving Corp.*, 845 F.2d

23, 26 (1st Cir. 1988) (Breyer, J.) ("[w]hen state law pierces the corporate veil, where the owner is the corporation's alter ego, where state or other relevant federal law makes the owner liable, it is fairly easy to say that the *owner is the corporation*") (emphasis supplied). The decision whether to pierce a corporate veil is, therefore, subsidiary to the underlying cause of action.

When the underlying cause of action rests on a federal statute, the decision whether to pierce the corporate veil and hold an individual liable is necessarily informed by the policies and purposes of the federal statute at issue. This Court has recognized on numerous occasions that an incorporated entity "is not to be regarded as legally separate from its owners in all circumstances." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983). "In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." *Id.* at 630.

Veil piercing is the norm under federal statutes, including federal employment and civil rights statutes. See *United States* v. *Bestfoods, Inc.*, 524 U.S. 51 (1998) (authorizing veil piercing under CERCLA and making clear that, absent clear language to the contrary, it is the norm); *Bufco Corp.* v. *NLRB*, 147 F.3d 964, 969 (D.C. Cir. 1998) (describing the federal common law of veil piercing); *Radio & Mach. Workers* v. *Pleasant St. Corp.*, 960 F.2d 1080 (1st Cir. 1992) (same in ERISA context); *Lumpkin* v. *Evnirodyne Indus., Inc.*, 933 F.2d 449, 460-63 (7th Cir. 1991) (same). Veil piercing is consistent with the language of the FHA and best serves the congressional intent and purposes described *supra*. The critical point here, however, is that the question whether the corporate veil of Triad should be pierced (making Meyer liable for Crank's actions) is independent of the question whether Meyer is vicariously or directly liable Crank's acts.

8. *Meyer's Liability For His Failure to Fulfill His Professional Obligations.* Finally, all parties are in agreement

that Meyer may be held liable for violations of the FHA or other laws caused by his own acts or omissions. See *Bestfoods*, 524 U.S. at 65 ("[a]part from corporation law principles, a shareholder, *whether a natural person or a corporation*, may be liable on the ground that such shareholder's activity resulted in the liability") (citation omitted). As is set forth in respondents' brief, Meyer's failure to fulfill his legal obligation to supervise Crank may make him liable under the FHA for Crank's discrimination pursuant to several legal theories imposing direct liability. This issue was not addressed below and would be an appropriate subject for remand, if necessary.

* * * *

The FHA imposes vicarious liability upon principals for the acts of agents within the scope of agency. Crank was Meyer's agent and was acting within the scope of his agency. Accordingly, Meyer is liable for Crank's discrimination under the FHA.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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